34834-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

AARON LLOYD CARPER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. Mr. Carper was deprived of his constitutional right to a unanimous jury verdict.

2. Prosecutorial misconduct deprived Mr. Carper of his constitutional right to a fair trial.

3. Mr. Carper was denied his constitutional right to a fair and impartial jury when the trial court erroneously granted the State's motion to dismiss a juror for cause.

4. The trial court misapplied RCW 46.20.285(4) to the facts of Mr. Carper's case.

II. ISSUES PRESENTED

1. Whether the claimed error regarding jury unanimity and the trial court's failure to *sua sponte* give the jury a *Petrich* instruction was a manifest constitutional error, such that the error may be raised for the first time on appeal?

2. Whether the State presented evidence of multiple acts occurring during the charging period, any one of which could support the crime charged, necessitating a *Petrich* unanimity instruction?

3. Whether the prosecutor's closing argument was so flagrant and ill-intentioned that no admonition to the jury could have cured any resulting prejudice, where the prosecutor's remarks were at most, ambiguous, the defendant did not object to the statements, and where both the defendant and prosecutor subsequently neutralized any impropriety?

4. Whether the trial court manifestly abused its discretion in dismissing a juror for cause when that juror indicated he could not be impartial toward either the State or the defendant?

5. Whether the trial court misapplied RCW 46.20.285 when it imposed a driver's license revocation after finding the defendant committed a felony in which a motor vehicle was used?

III. STATEMENT OF THE CASE

On June 3, 2016, the State charged Aaron Carper with two counts of second degree possession of stolen property other than a firearm or motor vehicle (counts 1 and 2), one count of possession of a stolen motor vehicle (count 3), and one count of third degree possession of stolen property (count 4). CP 1-2.

Substantive facts.

Corporal Michael McNees was working for the Spokane County Sheriff's Department on March 8, 2016, and responded to a call of suspicious activity and squatters living in a vacant house at 5321 South Perry Street in Spokane, Washington.[1] RP 106-107. Upon arriving at the residence, the Corporal spoke to Brian Baird in the front yard regarding his tenancy at the property. RP 107-108. While in the front yard, Corporal McNees observed a 30-foot flatbed trailer with a built-in tool box, large enough to haul cars; the Corporal checked its license plate, and

[1] Corporal McNees had responded to a similar call at the same location approximately one month prior. RP 107, 127.

determined it was stolen. RP 112. The trailer was full of a number of items. RP 113.

Other deputies arrived to assist and spoke with other individuals[2] who lived at the residence. RP 114. While at the residence, Corporal McNees was allowed into the backyard, at which time he observed three trailers - of interest was a flatbed trailer. RP 108. The Corporal testified the flatbed trailer had no license plates affixed to it, and appeared to be used for transporting four wheelers or cars. RP 109. Corporal McNees determined from the VIN (vehicle identification number) plate that the flatbed trailer had been reported stolen by its owner, David Tremaine. RP 110-111, 117.

Because a motorcycle had been stolen at the same time as Mr. Tremaine's trailer, Corporal McNees asked Dennis Swanson, who lived at the residence, whether there was a motorcycle inside the home. RP 115. Swanson answered in the affirmative and retrieved it from the kitchen of the residence. RP 115. The motorcycle's ignition had been "punched," meaning its ignition had been removed and the wires exposed

[2] Deputies spoke with Jessica Maas and Dennis Swanson, who also testified at trial. RP 114-115.

to allow the motorcycle to start without a key. RP 116. The motorcycle was also owned by David Tremaine.[3] RP 117.

Detective Dean Meyer requested the officers on scene impound and secure the stolen trailers at the sheriff's office. RP 130-131. The detective determined that the stolen 30-foot flatbed trailer from the front yard belonged to Ronald Miller.[4] RP 138. Inside the trailer's toolbox, the detective located a license plate associated with a stolen 2013 Continental trailer belonging to Joseph Neuman.[5] RP 133. The 30-foot flatbed trailer was loaded with construction materials, paints, and tools, including a Ridgid

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[3] Mr. Tremaine had reported his belongings stolen on the morning of March 7, 2016. RP 269. He went to the South Perry residence, and identified his motorcycle and trailer at that location. RP 270. He had purchased the trailer for $200 and had invested another $100 into it; he estimated the value to be less than $750. RP 271. He had never given anyone permission to take either item. RP 272-273.

[4] Ronald Miller testified that around March 8, 2016, he discovered that the trailer he had parked at his work was missing. RP 160. The trailer had been parked behind the building with a lock on the trailer tongue. RP 161. The trailer weighed around 1,500 pounds, and Mr. Miller would use his three-quarter or half-ton pick-up trucks to haul it. RP 162. Mr. Miller positively identified the flatbed trailer as his. RP 165. He did not give anyone permission to take the trailer. RP 165-167. He subsequently sold the trailer for $1,200, but had purchased it for $900. RP 164.

[5] Joseph Neuman owned a small construction company. RP 171. Eric Pierce was one of his subcontractors. RP 172. On March 4, 2016, Mr. Neuman arrived at work and discovered that his fully enclosed 2013 Continental trailer was missing. RP 173. He reported it stolen. RP 173. At the time the trailer was taken, Mr. Neuman estimated the trailer contained between $10,000 and $12,000 worth of tools and other equipment. RP 173-174. Mr. Pierce estimated the total value of the contents of the trailer at the time it was stolen to be $7,000. RP 205.

shop vac. RP 133-134. On March 9, 2016, when Detective Meyer contacted Mr. Neuman, Mr. Neuman told him that he was missing an enclosed trailer containing construction items, to include a Ridgid shop vac; the detective asked Mr. Neuman to come to the sheriff's department to identify whether other items in the trailer belonged to him. RP 137, 178.

In the trailer, Mr. Neuman identified the base of a punching bag, a multi-position ladder, a set of saw horses, a paint tote, tripod legs for a construction transit, gas cans, a DeWalt sawzall and its case, a zip wall and its case, a shop vac,[6] an extension ladder, the top of the punching bag, moulding, and miscellaneous lumber and trim, all belonging either to Eric Pierce or himself. RP 180-186. Mr. Neuman estimated the value of the items recovered from the trailer alone to be $500 to $700 dollars.

Detective Meyer authored and was granted a search warrant for the 5321 South Perry residence, based on the presence of the stolen motorcycle within the home, and the stolen trailers located outside the home. RP 139. On March 10, 2016, the detective, along with others, went to the residence, knocked on the door and requested access to the home. After there was no

[6] The detective also determined that some of the stolen items in the trailer belonged to Mr. Neuman's business partner, Eric Pierce. RP 135. On March 9, 2016, Mr. Pierce also physically went to identify items located in the trailer, and at trial, specifically identified the shop vac, the sawzall, and an extension ladder, as belonging to Neuman or himself. RP 207.

response, the detectives breached the door, and detained the four individuals who were inside the residence to conduct separate interviews.[7] RP 139-140. While conducting an initial search of the residence, the detective noticed that there were a number of items in the living room that potentially matched items stolen from Mr. Neuman and Mr. Pierce. RP 140.

Detective Meyer then requested Mr. Neuman and Mr. Pierce respond to the residence to attempt to identify any items within the home that had been stolen from them. RP 140. Mr. Neuman and Mr. Pierce responded that day, and positively identified a number of construction tools and supplies as being theirs. RP 141. Mr. Neuman specifically identified: sand paper, hand tools, a diamond blade for a tile saw, work lights, another zip wall, a vacuum, tile spacers, as well as other miscellaneous construction equipment.[8] RP 188-193. Mr. Neuman estimated the value of the items found in the South Perry residence to be $500 to $700.[9] RP 194. Neither Mr. Neuman nor Mr. Pierce gave anyone permission to take their belongings. RP 194, 211-212.

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[7] Detectives detained Brian Baird, Jessica Maas, Dennis Swanson and Bonita Mullins. RP 140.

[8] At trial, Mr. Pierce identified items located at the house, including a zip wall, flood light, caulk, saw blades, trowels, a garbage can, paint, and oil. RP 210.

[9] Mr. Pierce estimated the total value of all the recovered items to be approximately $700. RP 211.

Mr. Neuman testified that he used a pickup truck to pull the construction trailer, and that based on its weight, one would need a truck to pull it.[10] RP 195. During his investigation, Detective Meyer determined that Mr. Baird and Ms. Maas drove a small Volkswagen Golf, incapable of pulling a trailer. RP 146, 227, 244. Neither Mr. Swanson nor Ms. Mullins owned a vehicle. RP 146, 226. Mr. Carper drove a truck.[11] RP 227, 244.

Dennis Swanson, who lived at the South Perry house, testified that Mr. Carper had stayed at the residence for two or three nights. RP 216. No one who was staying at the residence was employed at the time. RP 217. He stated that one morning, immediately after he awoke, he found the motorcycle in the kitchen. RP 220. The motorcycle was not at the house before Mr. Carper stayed there. RP 221. Other construction items and tools found in the house were not there prior to Mr. Carper's arrival. RP 228.

Jessica Maas, who was under a cooperation agreement with the State, testified in exchange for having an unrelated charge dismissed.

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[10] Q. And based on the size of the trailer and the weight of the trailer, would you have needed a truck to pull it.
A. Yes.
Q. So a small car would not have been able to do it.
A. Not very good.

RP 195.

[11] Dennis Swanson surmised the truck was a "half-ton." RP 227.

RP 239. She indicated Aaron Carper was a childhood friend of her significant other, Brian Baird. RP 239. Mr. Carper had been staying at the residence, predominantly in the living room and basement, for a couple of days before law enforcement arrived on March 8, 2016, and while Mr. Carper stayed there, the stolen items located at the residence also started to appear at the house. RP 240, 245-246, 251, 254. Mr. Carper had asked the other residents of the house not to tell police that he was present at the house,[12] and hid under Ms. Maas' bed while police were outside. RP 242. Ms. Maas confronted Mr. Carper about the items that he brought to the house, asking him "if all the stuff was legit[13] that was out in [her] yard." RP 243, 260. He reassured her that it was not stolen, and belonged to him. RP 243. At a time prior to law enforcement's arrival at the home, she had seen Mr. Carper working on the motorcycle in the kitchen. RP 248.

Procedural facts.

On October 3, 2016, immediately preceding trial, the State requested and was granted permission to amend the information, to remove from count 1 the allegation that the defendant possessed the stolen 2013

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12 Mr. Carper had a warrant for child support enforcement. RP 242.

13 Ms. Maas defined "legit" as "unstolen." RP 243.

Continental utility trailer. RP 84-85; CP 1-2, 15-16. In all other respects, the amended information was identical to the original information.[14]

a) Jury selection.

During jury selection, the State moved to strike for cause juror 14, based on the following exchange:

> MR. CASHMAN: Okay. Does anyone here feel the same way as Number 9?
>
> PROSPECTIVE JUROR NO. 14: I do.
>
> MR. CASHMAN: Number 14, why?
>
> PROSPECTIVE JUROR NO. 14: I go by the same adage. You lay down with dogs, you get up with fleas.
>
> MR. CASHMAN: So you think it would be improper for the State to present testimony from a witness?
>
> PROSPECTIVE JUROR NO. 14: Not improper, but probably the jurors would have to look at that differently. I would.
>
> MR. CASHMAN: Okay. Give me a reason why you think the State might give someone a benefit to come and testify when they may have beenconnected?
>
> PROSPECTIVE JUROR NO. 14: You know, I don't know. I don't know.
>
> MR. CASHMAN: Would it be to help prove an element of the case?
>
> PROSPECTIVE JUROR NO. 14: It could. It could.

[14] Except for a scrivener's error in count 2, which inadvertently omitted the value of the possessed property, an error which was corrected by the State and Court before trial commenced. RP 85-87; CP 16.

MR. CASHMAN: Do you think it would be proper in that situation if the State needed to prove the element against the defendant to give a person a cooperation agreement essentially so that they can prove thatelement?

PROSPECTIVE JUROR NO. 14: That's tough.

MR. CASHMAN: Why do you think it's tough?

PROSPECTIVE JUROR NO. 14: I don't know. Like Isaid, if they're associates, I think they have the same penalty.

MR. CASHMAN: Okay. So your position then, just so I'm paraphrasing it correctly, would be that you would have a problem weighing -- being able to fairly and accurately weigh the credibility of that witness because they have a cooperation agreement?

PROSPECTIVE JUROR NO. 14: Exactly.

MR. CASHMAN: Who here feels that same exact way there's a reason? Number 23, you feel the same way?

PROSPECTIVE JUROR NO. 23: Yeah.

MR. CASHMAN: So you think you just couldn't if that person testifies and you hear they have a cooperation agreement, I'm not going to believe that?

PROSPECTIVE JUROR NO. 23: I would be a little suspicious.

PROSPECTIVE JUROR NO. 14: Could I backtrack a minute back while just if I've experienced anything? Last November during wind storm, we were fortunate enough to get a generator. My neighbor and her friends tried stealing it, 10,000 watt. They couldn't lift it. They failed. They tried, but she's incarcerated right now for stolen property, identity theft, mail theft. So yeah, I would be a little biased against anything like this for sure.

> MR. CASHMAN: So but that bias has nothing to do with the cooperation agreement. That bias is simply based upon your experience?
>
> PROSPECTIVE JUROR NO. 14: Mm-hmm.
>
> MR. CASHMAN: Based upon what you said you experienced just now or during the wind storm, you don't think you could set that aside?
>
> PROSPECTIVE JUROR NO. 14: I don't think so because I witnessed all of her associates that came in and out of her house, and they're all cut from the same bolt. I hate to be so firm, but.
>
> MR. CASHMAN: If I may have a moment? Your Honor, do you want to address causes?
>
> THE COURT: No, you can keep going.
>
> MR. CASHMAN: Okay. Thank you.

RP 53-55.

The following exchange occurred when the State challenged prospective juror 14:

> [THE COURT:] Counsel, for cause, does the State have any that you want to strike for cause?
>
> MR. CASHMAN: Yes. Number 14 given his answer regarding his experiences recently during the wind storm and his response which was he was biased, I think it's appropriate for cause.
>
> THE COURT: Any objection to striking Number 14?
>
> MR. DRESSLER: Let me look at my notes real quick, Your Honor. (Pause) Your Honor, I'm aware that Mr. Yamada

> indicated the problems dealing with the neighbor's trying to steal his generator. He said in that case, he couldn't set aside the biases.
>
> I don't know that he's ever actually said he could not do it in this particular case. So I would not agree for cause.
>
> THE COURT: Okay. He did say he could not be fair with the cooperation agreement. That would take him out for that. So the Court is going to go ahead and strike him for cause. Any others from the State?

RP 74.

b) Closing argument.

In its closing argument, the State indicated:

> Both Mr. Neuman and Mr. Pierce testified the property was worth upwards of thousands. Mr. Neuman approximated at 10,000. Mr. Pierce approximated at 7,000 give or take. Of the items they were able to recover, if you recall the testimony of Mr. Neuman, was somewhere between $500 and $1,200, and Mr. Pierce indicated $700, maybe more or maybe less. This is an approximation. That is the reason why the State requested the lesser included.[15]
>
> So the State believes that the evidence shows that the defendant possessed the total amount of tools. However, as finders of fact, you are allowed to give weight and credibility to the evidence before you. If you find that the value of the property was less than $750, then you have the ability to find him guilty not of possession in the second degree, but possession of stolen property in the third degree because the difference in that is the value of the property, but, again, recall the testimony of Mr. Neuman and Mr. Pierce, both of

[15] The State requested the court instruct the jury on the lesser included offense of third degree possession of stolen property regarding count 1, as the estimated value of the recovered stolen property by Mr. Neuman and Mr. Pierce varied between $700 and $1,400. RP 277; CP 95-95.

> which approximated the value of everything that was in that trailer was well thousands of dollars.

RP 314.

No objection was made to this argument. RP 314. However, in defendant's closing, defense counsel argued:

> Now, the State has made a point of telling you that the testimony was that the value of the contents of that trailer, not counting the trailer, just the contents, was between 10 and $12,000. It's a very specific number except for one thing. It doesn't relate to this case.
>
> Mr. Carper is not charged with having stolen the trailer, not having been charged with having stolen the tools, but to have been in possession of them. So the $10,000 to $12,000 value of those things is not the issue here. It is at the time they were recovered, how much value there was, and Mr. Neuman said that it was between $500 and $700.
>
> Now, that particular figure was backed up by Mr. Pierce, who is the subcontractor to Mr. Neuman, and he had said the value of what's in the trailer. Again, not really relevant, $7,000, but when asked of the items recovered, the question was everything that was recovered what would it have been worth, and he said around $700.
>
> So with regards to the one charge on the tools, the State has to prove to you it's worth more than $750, which is one of the reasons why the State has put in what's called a lesser included. If you don't believe that we've met the over $750, take a look to see whether or not we met the $700. Well, on the value of what was recovered, the $750 or below has been met, but we're not really done with that count yet.

RP 321.

In rebuttal closing, the State addressed defense counsel's argument:

> Now, the defense talked about the value of the tools, and I think there might have been a little bit of confusion on that. Mr. Pierce talked about the value of the tools that they recovered, and he indicated somewhere around $700.
>
> If you recall Mr. Neuman's testimony, his testimony he broke it into two sections. Remember he talked about when he first recovered it, the property at the sheriff's lot and then the second time when he recovered it at the house of 5321 South Perry Street.
>
> Recall his testimony about the values he's assessed for the property that he recovered during those two times. He didn't say the total amount was $700. He said the total amount that we were able to recover during this first period of time I believe he stated was $500 to $700 and the second time he indicated I believe around $500 to $700 I believe.
>
> That's important because it comes together. It's not simply this total value. He broke it down into two separate sections to indicate the value of the property that he recovered on the two separate times, not just this one time as indicated in the defense's closing.

RP 338.

The jury found the defendant guilty of all four counts of the information, as amended. CP 17-20. The court sentenced the defendant to 12 months plus one day in custody for count 3, and 8 months on counts 1 and 2. CP 28. All sentences were ordered to be served concurrently. CP 28. The trial court found that count 3, possession of a stolen motor vehicle, is a felony in the commission of which the defendant used a motor vehicle, and

pursuant to RCW 46.20.285, ordered the revocation of the defendant's driver's license. CP 33.

The defendant timely appealed.

IV. ARGUMENT

A. THE APPELLANT, ALLEGING FOR THE FIRST TIME ON APPEAL THAT HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT WAS VIOLATED, HAS NOT DEMONSTRATED THE EXISTENCE OF A MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT PURSUANT TO RAP 2.5(a)(3).

It is a fundamental principle of appellate jurisprudence in that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied in Washington under RAP 2.5.

RAP 2.5 is principled as it "affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal." *State v. Strine*, 176 Wn.2d at 749, quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the court noted the rule requiring objections helps prevent abuse of the appellate process:

> [I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the

> issues will be available, ensures that attorneys will act in good faith by discouraging them from "riding the verdict" by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.
>
> BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6-2(b), at 472-73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless the claim involves a manifest error affecting a constitutional right.[16] Specifically regarding RAP 2.5(a)(3), our courts have indicated that "the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *State v. Scott,* 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Here, defendant alleges that the trial court erred by failing to give a *Petrich* [17] instruction even though such an instruction was neither proposed by the defendant nor did he take any exception to the court's instructions.

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[16] An issue may also be raised for the first time on appeal if it involves trial court jurisdiction or failure to establish facts upon which relief can be granted. RAP 2.5(a)(1) and (2).

[17] *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

The failure to assert this issue at the trial court is not reviewable on appeal, because there is not a showing that the alleged error is manifest.

1. Manifest error.

To establish that the alleged constitutional error is reviewable, the defendant must establish that the error is "manifest." Here, any error relating to the trial court's failure to *sua sponte* supply a *Petrich* instruction or require the State to elect a particular criminal act was not manifest or obvious, as is required by RAP 2.5.

> In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review. *See Harclaon,* 56 Wn.2d at 597, 354 P.2d 928; *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (footnote omitted) (emphasis added).

There is nothing in defendant's claim of manifest error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such

that the judge trying the case should have clearly noted a *Petrich* violation and remedied it.

State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), requires that in cases presenting evidence of *several acts, any of which could form the basis of one count charged,* either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act. *See also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

Contrary to the defendant's claims, no election or unanimity instruction is required in cases like the instant one. Here, as discussed below, the alleged additional act cannot form the basis of any criminal count charged. *Petrich,* 101 Wn.2d 566. The fact that the defendant attempts to argue that this case is a "multiple acts" case demonstrates that the issue is *debatable* and therefore not *manifest* - not obvious or flagrant - as is required by RAP 2.5 for this court to grant review absent preservation of the issue for appeal by timely objection at trial. This court should decline the invitation to address the unpreserved argument that the trial court should have *sua sponte* supplied a *Petrich* instruction to the jury.

2. The evidence presented regarding the total value of the stolen items from the Continental trailer could not "form the basis of a count charged" and is therefore, not subject to a *Petrich* unanimity instruction or an election by the State.

Count I, second degree possession of a stolen property other than a firearm or motor vehicle, alleged that the specific act of possessing the stolen tools and construction materials occurred on or about March 8, 2016 and March 10, 2016. CP 15. The jury was instructed that, in order to find the defendant guilty of this crime, it must find that between March 8 and March 10, the defendant knowingly received, retained, possessed, concealed or disposed of stolen property - specifically tools and construction materials. CP 81.

Thus, in order for a *Petrich* instruction to be necessary as to any other act of possession of stolen tools and construction materials by the defendant, there would need to be evidence presented that the defendant possessed those items during the same time period charged in the information. The time frame in which the crime was alleged to have occurred in this case was very short - three days inclusive.[18] The State did

[18] This case is unlike child abuse or sex offense cases in which the state often presents multiple separate criminal acts occurring within a large time frame – a necessity when dealing with children's frequent inability to recall specific dates. *See State v. Coleman*, 159 Wn.2d 509, 150 P.3d 1126 (2007); *State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988) (unanimity instruction required where State presented evidence of multiple acts of sex offenses with children at different times and places); *Petrich*, 101 Wn.2d 566 (multiple incidents of child molestation at different times and places); *State v. Jones*, 71 Wn. App. 798, 863 P.2d 85 (1993)

not present any evidence, whatsoever, that the defendant possessed any stolen tools or construction materials other than those recovered from Mr. Miller's stolen 30-foot trailer and the residence on South Perry during the specific time period charged - March 8 through 10, 2016. Thus, even though evidence was presented that other items were taken from Mr. Neuman and Mr. Pierce *before* that date, as the Continental trailer was reported stolen on March 4, 2016, the jury was instructed by the court in its to-convict instruction that it was *only* to determine whether the crime of possession of stolen property occurred between March 8 and 10, 2016. This claim is without merit because the evidence presented of the alleged "other act" did not occur within the time frame charged in the information or to which the jury was instructed to look in the to-convict instruction. The jury's verdict reflects a unanimous decision that the defendant possessed the stolen tools and construction equipment found by law enforcement in the trailer and South Perry residence within the time period charged in the information. No *Petrich* instruction was necessary.

(multiple incidents of child molestation at different times and places), *review denied*, 124 Wn.2d 1018 (1994). Rather, this is a case where the jury was required to look at a three day time period and decide whether the defendant possessed stolen tools and construction materials during that time.

B. THE PROSECUTOR DID NOT ENGAGE IN MISCONDUCT BY REQUESTING LEAVE TO AMEND THE INFORMATION PRIOR TO THE START OF TRIAL OR IN THE STATE'S CLOSING ARGUMENT.

Standard of review.

The trial court's grant of a motion to amend an information is reviewed for abuse of discretion. *State v. Brett,* 126 Wn.2d 136, 155, 892 P.2d 29 (1995), *cert. denied,* 516 U.S. 1121 (1996). Under the criminal court rules, a trial court may allow the amendment of the information at any time before the verdict as long as the "substantial rights of the defendant are not prejudiced." CrR 2.1(d). Importantly, the defendant bears the burden of showing prejudice. *State v. Guttierrez,* 92 Wn. App. 343, 346, 961 P.2d 974 (1998).

Additionally, when a defendant does not request a continuance, it suggests there is no prejudice. *See State v. Murbach,* 68 Wn. App. 509, 512, 843 P.2d 551 (1993) (absence of request for a continuance indicated amendment to information was not prejudicial); *State v. Wilson,* 56 Wn. App. 63, 65, 782 P.2d 224 (1989) (failure to request continuance waived objection to amended information), *review denied,* 114 Wn.2d 1010 (1990); *State v. Brown,* 55 Wn. App. 738, 743, 780 P.2d 880 (1989) ("the fact that the defendant does not request a continuance is persuasive of lack of surprise and prejudice"), *review denied,* 114 Wn.2d 1014 (1990).

There was no prejudice resulting from the amendment itself in the instant case.

Prosecutorial misconduct.

Defendant alleges for the first time on appeal that the prosecutor engaged in misconduct by "continually encouraging the jury to find that Mr. Carper possessed all the tools in the Continental trailer, in order to show that Mr. Carper possessed over $750 in tools and construction materials," despite the State's request to amend the information to avoid proving the defendant possessed the stolen continental trailer. Br. at 17. Defendant further alleges that the State argued that the defendant possessed all of the tools that had been taken from the Continental trailer, to include those that were never recovered. Br. at 18.

A defendant alleging prosecutorial misconduct bears the burden of first establishing "the prosecutor's improper conduct and, second, its prejudicial effect." *State v. Dhaliwal,* 150 Wn.2d 559, 578, 79 P.3d 432 (2003). In this context, "prejudicial effect" means that there was a "substantial likelihood" that the challenged comments affected the verdict. *State v. Reed,* 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

Appellate courts review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions.

State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). Where the defense fails to timely object[19] to an allegedly improper remark, the error is deemed waived unless the remark is "so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell,* 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." *State v. Thorgerson,* 172 Wn.2d 438, 455, 258 P.3d 43 (2011).

Here, the prosecutor's remarks during its initial closing argument were certainly inarticulate. The prosecutor stated:

> Both Mr. Neuman and Mr. Pierce testified the property was worth upwards of thousands. Mr. Neuman approximated at 10,000. Mr. Pierce approximated at 7,000 give or take. Of the items they were able to recover, if you recall the testimony of Mr. Neuman, was somewhere between $500

[19] "If either counsel indulges in any improper remarks during closing argument, the other must interpose an objection at the time they are made. This is to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks." 13 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice and Procedure § 4505, at 295 (3d ed. 2004). Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process. *State v. Weber*, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006) (were a party not required to object, a party "'could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal'").

> and $1,200,[20] and Mr. Pierce indicated $700, maybe more or maybe less. This is an approximation. That is the reason why the State requested the lesser included.
>
> So the State believes that the evidence shows that the defendant possessed the total amount of tools. However, as finders of fact, you are allowed to give weight and credibility to the evidence before you. If you find that the value of the property was less than $750, then you have the ability to find him guilty not of possession in the second degree, but possession of stolen property in the third degree because the difference in that is the value of the property, but, again, recall the testimony of Mr. Neuman and Mr. Pierce, both of which approximated the value of everything that was in that trailer was well thousands of dollars.

RP 314.

However inarticulate or inartful the prosecutor's argument may have been, the defendant has failed to demonstrate how the prosecutor's statements were so flagrant and ill-intentioned that the court could not have cured any resulting prejudice by an instruction to the jury to disregard the argument. The statement could be taken to mean, as defendant indicates, that the State was extending an invitation to the jury to find that Mr. Carper possessed the total $10,000 worth of tools and construction materials taken from Mr. Neuman and Mr. Pierce on March 4, 2016. More likely, however, is that the prosecutor was simply talking about the value of the property that

[20] The State surmises that the inaccurate $1,200 figure came from Mr. Miller's testimony that he sold his trailer for $1,200. Mr. Neuman testified the total recovered property from each site was $500 to $700, which would add up to $1,000 to $1,400 in total value.

was recovered; after having conceded that the evidence might indicate that the recovered property's value was not in excess of $750, the prosecutor asked the jury to consider the total value of the property *taken* to determine whether Mr. Pierce's estimation that the value of the recovered property did not exceed $700 was accurate, or whether Mr. Neuman's estimation was more credible. When viewed in this light, the ambiguous remarks made by the prosecutor were not inappropriate, and were certainly not flagrant and ill-intentioned as is required for review of claimed, yet unobjected-to, prosecutorial misconduct.

Furthermore, the defendant has failed to demonstrate how an instruction by the court could not have remedied any potential prejudice resulting from the prosecutor's argument. The allegedly improper argument was neutralized by both defense counsel and the prosecutor during his rebuttal closing. Defense counsel reminded the jury that Mr. Carper was not charged with possessing any of the unrecovered items. RP 321. In rebuttal, the prosecutor argued that although the value of the recovered items was estimated to be $700 by Mr. Pierce, the jury could add up the total amounts estimated by Mr. Neuman to arrive at a value over $750. RP 338. The prosecutor did not repeat the allegedly improper argument in his rebuttal closing, strongly suggesting that the prosecutor never intended to argue that the defendant was guilty of possessing $10,000 worth of stolen property.

When viewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the jury instructions, the misstatement was not so egregious as to prejudice the defendant's right to a fair trial. Multiple separate items of stolen property were found in the defendant's possession, to include the flatbed trailer and motorcycle belonging to Mr. Tremaine, which Ms. Maas had seen Mr. Carper working on in the kitchen of the residence, and was reported stolen by Mr. Tremaine only a day before it was recovered by law enforcement at the residence (March 7, 2016) and the 30-foot trailer belonging to Mr. Miller, which Mr. Miller discovered was stolen on the same day it was later found at the residence (March 8, 2016). Mr. Carper was the only person staying at the residence at that time who had the means to haul large trailers - the other residents either used a small passenger car with no hitch, or had no vehicle whatsoever, but Mr. Carper had a half-ton pick-up truck. Ms. Maas and Mr. Swanson testified that the stolen items were not at the house before Mr. Carper arrived. Ms. Maas confronted Mr. Carper about the items and he claimed ownership of the stolen goods.

Finally, the jury was instructed to disregard counsel's statements and argument that were unsupported by the evidence or the jury instructions:

> The lawyer's remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

WPIC 1.02; CP 73.

The jury is presumed to have followed the court's instructions. *See e.g., State v. Babcock*, 145 Wn. App. 157, 185 P.3d 1213 (2008). Absent a showing of flagrant and ill-intentioned misconduct by the State that has resulted in prejudice to the defendant, that presumption remains. Here, in the context of the case taken as a whole, the jury instructions given, and the other arguments made by both counsel, any impropriety in the prosecutor's statement did not prejudice the defendant. This claim also fails.

C. THE TRIAL COURT DID NOT ERR IN DISMISSING A JUROR FOR CAUSE ON THE STATE'S MOTION.

Under the Sixth Amendment and article 1, section 22 of the state constitution, a defendant is guaranteed the right to a fair and impartial jury. However, the defendant "has no right to be tried by a particular juror or by

a particular jury." *State v. Gentry*, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995).

A party may challenge a juror for cause and "if the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case." CrR 6.4(c)(1). One basis upon which a party may challenge a juror for cause is actual bias, i.e., the existence of a state of mind which satisfies the court that the potential juror "cannot try the issue impartially and without prejudice to the substantial rights of the party challenging" the juror. RCW 4.44.170(2).

Granting or denying a challenge for cause is within the discretion of the trial court, and will be reversed only for manifest abuse of discretion. *State v. Gilcrist*, 91 Wn.2d 603, 611, 590 P.2d 809 (1979). A trial court abuses its discretion if its "decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Berniard*, 182 Wn. App. 106, 118, 327 P.3d 1290 (2014). A court acts on untenable grounds "if its factual findings are unsupported by the record," acts for untenable reasons "if it has used an incorrect standard," and its decision is manifestly unreasonable "if its decision is outside the range of acceptable choices given the facts and the legal standard." *Id.* This standard of review recognizes that the trial court is in the best position to determine

whether a juror can be fair and impartial because the trial court is able to observe the juror's demeanor and evaluate the juror's answers to determine whether the juror would be fair and impartial. *State v. Birch,* 151 Wn. App. 504, 512, 213 P.3d 63 (2009). The trial court need not wait for the parties to challenge jurors who have biased opinions or feelings about the case they are asked to decide, as the court has an obligation independent from that of the parties to ensure a fair and impartial jury. *State v. Slert*, 186 Wn.2d 869, 383 P.2d 466 (2016). A trial court need not disqualify a juror with preconceived ideas if the juror can "put these notions aside and decide the case on the basis of the evidence given at the trial and the law as given him by the court." *State v. Mak,* 105 Wn.2d 692, 707, 718 P.2d 407, *cert. denied,* 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).

Berniard, *supra*, involved the dismissal of a juror *during deliberations*, and is inapplicable here. *State v. Wilson*, also cited by the defendant, is inapplicable because it involved the trial court's *refusal* to excuse a juror for cause. 141 Wn. App. 597, 171 P.3d 501 (2007). The argument that defendant presents in the instant case is that the trial court erroneously excused a juror for cause, based on reasons unsupported by the record. However, contrary to defendant's claims, the record clearly supports

the conclusion that Juror 14 could not be fair and impartial and was actually biased against both parties:

> MR. CASHMAN: So you think it would be improper for the State to present testimony from a witness?
>
> PROSPECTIVE JUROR NO. 14: Not improper, but probably the jurors would have to look at that differently. I would.
>
> …
>
> MR. CASHMAN: Do you think it would be proper in that situation if the State needed to prove the element against the defendant to give a person a cooperation agreement essentially so that they can prove thatelement?
>
> PROSPECTIVE JUROR NO. 14: That's tough.
>
> MR. CASHMAN: Why do you think it's tough?
>
> PROSPECTIVE JUROR NO. 14: I don't know. Like Isaid, if they're associates, I think they have the same penalty.
>
> MR. CASHMAN: *Okay. So your position then, just so I'm paraphrasing it correctly, would be that you would have a problem weighing -- being able to fairly and accurately weigh the credibility of that witness because they have a cooperation agreement?*
>
> PROSPECTIVE JUROR NO. 14*: Exactly.*
>
> MR. CASHMAN: Who here feels that same exact way there's a reason? Number 23, you feel the same way?
>
> PROSPECTIVE JUROR NO. 23: Yeah.
>
> …
>
> *PROSPECTIVE JUROR NO. 14: Could I backtrack a minute back while just if I've experienced anything? Last November*

> *during wind storm, we were fortunate enough to get a generator. My neighbor and her friends tried stealing it, 10,000 watt. They couldn't lift it. They failed. They tried, but she's incarcerated right now for stolen property, identity theft, mail theft. So yeah, I would be a little biased against anything like this for sure.*
>
> MR. CASHMAN: *So but that bias has nothing to do with the cooperation agreement. That bias is simply based upon your experience?*
>
> PROSPECTIVE JUROR NO. 14: Mm-hmm.
>
> MR. CASHMAN: *Based upon what you said you experienced just now or during the wind storm, you don't think you could set that aside?*
>
> PROSPECTIVE JUROR NO. 14: *I don't think so because I witnessed all of her associates that came in and out of her house, and they're all cut from the same bolt. I hate to be so firm, but.*

RP 53-55 (emphasis added).

Prospective Juror 14 indicated both a bias against the State's witness, who was under a cooperation agreement, as well as a bias against the defendant, who was charged with possessing stolen property. The record adequately supports a trial court's conclusion that on *either* basis prospective juror 14 could not be fair and impartial. Therefore, the trial court did not err when it determined, "[h]e did say he could not be fair with the cooperation agreement. That would take him out for that. So the Court is going to go ahead and strike him for cause." RP 74. Likewise, the trial court would have been justified in striking the prospective juror based on

his experience as a property crime victim - an experience which caused him feelings that he would not be able to put aside in Mr. Carper's trial.

Furthermore, if the court had not excused prospective juror 14 based on his bias regarding the cooperation agreement, it should have dismissed the juror based on his bias against defendants accused of property crimes. If the court had not done so at defendant's request, defendant would now be claiming the court erred in or defense counsel was ineffective for retaining that juror, especially in light of defendant's challenge to juror 15 for cause for the very same reason - the juror's inability to put aside a bias against alleged thieves.[21]

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[21] Immediately after the State challenged prospective Juror 14, the defendant challenged prospective juror 15:

> Your Honor, Number 15 … had testified that he had his shop broken into, tools were stolen, and he could not say that he would be fair and impartial. We have enough jurors to pick from having somebody that can't say they'll be fair and impartial I believe would be a challenge for cause.
>
> …
>
> Your Honor, I think if they don't say I can be fair and impartial, essentially we have a problem because this is not an area that we should be running fast and loose with. He could not unequivocally say that he would be fair and impartial.

RP 75.

Based on this argument, the court struck potential juror 15 over the State's objection:

> Though, he did indicate that he didn't know. That he would like to think he is a fair-minded person, and then I actually explained

Furthermore, even if the dismissal of Juror 14 was in error, the defendant cannot demonstrate that the jury that was actually empaneled was not impartial. The defendant is not entitled to a specific jury or juror. Thus, any error in this regard was harmless, as the defendant has failed to demonstrate any probability that the outcome of the trial would have been different had prospective juror 14 been seated on his jury.[22]

D. THE TRIAL COURT DID NOT ERR IN FINDING THE DEFENDANT'S CRIME OF POSSESSION OF A STOLEN VEHICLE WAS A CRIME IN WHICH A MOTOR VEHICLE WAS USED.

Because this issue concerns the application of a statute to a specific set of facts, this Court's review of this issue is de novo. *State v. Hearn*, 131 Wn. App. 601, 609, 128 P.3d 139 (2006). Washington's license revocation statute, RCW 46.20.285, mandates that the Department of Licensing revoke a driver's license for one year where the driver has been

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> to him that he would be having to weigh, and he said he did not know at that time if he could be fair.
>
> I'm going to strike him only because he did say I don't know if I can be fair even after the Court explained it. So based on that, the Court is going to go ahead and strike Number 15 for cause based on that.

RP 75-76.

[22] A harmless error is an error which is trivial, formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case. *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

convicted of "[a]ny felony in the commission of which a motor vehicle is used." RCW 46.20.285(4). Washington courts have found that the statute clearly applies where the commission of a felony directly involves motor vehicle operation. *See, e.g., State v. Dykstra*, 127 Wn. App. 1, 11-12, 110 P.3d 758 (2005); *State v. Griffin*, 126 Wn. App. 700, 708, 109 P.3d 870 (2005). In other words, the vehicle must be an instrumentality of the crime, such that the offender uses it in some fashion to carry out the crime. *State v. B.E.K*. 141 Wn. App 742, 172 P.3d 365 (2007); *Hearn*, 131 Wn. App. 601 (revocation statute only applies when the vehicle has been "employed in accomplishing" the crime).

In *State v. Contreras*, a matter in which the defendant was convicted of *possession* of a stolen vehicle, this Court rejected a similar argument to that posed by the defendant in this case. 162 Wn. App. 540, 254 P.3d 214 (2011), *review denied*, 172 Wn.2d 1026 (2011). In *Contreras*, the defendant claimed that the stolen vehicle was "simply the object possessed" and was not used to commit the crime. *Id*. at 546. However, this Court observed, "Mr. Contreras used this car. He tried to relicense it. He possessed it. It was not something he did to the car. It was his use and his possession and assertion of ownership that satisfied the elements of the statute." *Id*. at 547. Unlike the defendant in *B.E.K.*, *supra*, who merely placed graffiti on a patrol car, but did not possess or use it, Mr. Carper's actions in secreting and

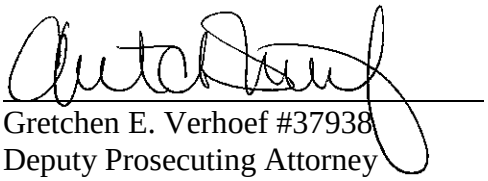
working on the motorcycle manifested his use and intended dominion and control over the motorcycle. Although Mr. Carper never attempted to relicense the vehicle as in *Contreras*, he claimed ownership of it to Ms. Maas, and worked on it in the kitchen of the South Perry residence. Based upon those facts, the trial court did not err in finding that Mr. Carper used a motor vehicle in the commission of a felony.

V. CONCLUSION

The State respectfully requests that this Court affirm the jury verdict and sentence imposed in Mr. Carper's case. The jury unanimously decided the defendant's guilt; the prosecutor did not engage in conduct, which, if error, could not have been cured by an objection and contemporaneous jury admonition; the trial court's decision to strike juror 14 was supported by the record; and the revocation of the defendant's privilege to drive was statutorily authorized.

Dated this 5 day of July, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. AARON L. CARPER, Appellant.	NO. 34834-2-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on July 5, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kate Benward
wapofficemail@washapp.org

7/5/2017	Spokane, WA	
(Date)	**(Place)**	**(Signature)**

SPOKANE COUNTY PROSECUTOR

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